Ibai Golf & Country Club Bhd v Laman Kejora Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-483–09 OF 2018
NANTHA BALAN J
1 MARCH 2019

Companies and Corporations — Winding up — Injunction to restrain petition — Application for Fortuna injunction — Defendant did not have judgment for debt — Defendant issued statutory notice demanding payment from plaintiff — Whether debt disputed on substantial grounds — Whether debt admitted by plaintiff — Whether grant of injunction to restrain presentation of winding up petition abuse of process — Whether there was merit in OS 483 — Companies Act 2016 s 466

This was an application by way of Originating Summons No WA-24NCC-483–09 of 2018 ('OS 483') for a Fortuna injunction to restrain the presentation of a winding up petition, consequent upon the issuance of a statutory notice by the defendant under s 466 of the Companies Act 2016 ('the statutory notice') demanding payment from the plaintiff in the sum of RM246,547 ('the debt'). The plaintiff was a wholly-owned subsidiary of Kuala Ibai Development Sdn Bhd ('KIDSB'). The parties had agreed that OS 483 will be a 'test case' and the outcome of OS 483 case will bind several other originating summons ('OS') applications of a similar nature which involved advances that were allegedly made to the subsidiaries of KIDSB ('the said agreement'). The OS applications which were within the ambit of the said agreement were: (a) OS 485, OS 487, OS 489, OS 491, OS 493, OS 495 and OS 497; and (b) OS 482, OS 484, OS 486, OS 490, OS 492, OS 496 and OS 498. The defendant had not filed any legal action against the plaintiff in respect of the debt. As such, the defendant did not have judgment for the debt. Nevertheless, the defendant issued the statutory notice. The defendant said that the debt was part of various advances that were made to subsidiaries of KIDSB which were all having financial problems. The issues for consideration were: (i) whether the debt was disputed on substantial grounds; (ii) whether the debt had been admitted by the plaintiff; (iii) whether the grant of injunction to restrain the presentation of a winding up petition an abuse of process; and (iv) whether there was merit in OS 483.

Held:

(1) The debt which was said to be due and owed by the plaintiff to the defendant had not been credibly disputed on any substantial or valid grounds. The debt due by the plaintiff to the defendant was in fact

admitted. The plaintiff was accordingly estopped from seeking to deny the existence of the debt, or in purporting to dispute the debt. The plaintiff's assertion did not sit well with the fact that the plaintiff's own administration and audit staff, Anuar, had confirmed that RM244,586 was due and owed. Further, the plaintiff's own auditor had examined the books, accounts and supporting documents and satisfied themselves that the debt existed and that it was indeed due and owed by the plaintiff to the defendant. Hence, the plaintiff's stance that there was no approval by the plaintiff for such an advance or that the plaintiff had no knowledge about the details of the advance flew in the face of the contemporaneous documents. It was nothing more than an 'afterthought' on the plaintiff's part (see paras 22–26).

(2) It was clear that Messrs Lim Soh & Goonting was challenging Anuar's locus standi vis a vis KIDSB. It was way too late for the plaintiff to impugn Anuar's authority to sign on the audit confirmation notes. Thus, the plaintiff's failure to impugn their own auditor's confirmation of the debt led to certain presumptions and legal consequences in favour of the defendant (see paras 29–30).

(3) As such, the debt had been admitted by the plaintiff and was therefore not in dispute. Hence, the grant of any injunction to restrain the presentation of a winding up petition would be an abuse of process. There was no merit in OS 483 and it was dismissed with costs. The plaintiff was to pay costs of RM5,000 subject to 4% allocatur to the defendant. The outcome in OS 483 would bind OS 485, OS 487, OS 489, OS 491, OS 493, OS 495 and OS 497. Consequently, OS 482, OS 484, OS 486, OS 490, OS 492, OS 496 and OS 498 were dismissed with no order as to costs (see paras 33 & 35).

[Bahasa Malaysia summary

Ini adalah permohonan melalui Saman Pemula No WA-24NCC-483-09 Tahun 2018 ('OS 483') untuk injunksi Fortuna untuk menghalang pengemukaan petisyen penggulungan, berikutan pengeluaran notis statutori oleh defendan di bawah s 466 Akta Syarikat 2016 ('notis statutori') menuntut pembayaran daripada plaintif dalam jumlah RM246,547 ('hutang'). Plaintif adalah anak syarikat milik penuh Kuala Ibai Development Sdn Bhd ('KIDSB'). Pihak-pihak telah bersetuju bahawa OS 483 akan menjadi 'kes ujian' dan hasil kes OS 483 akan mengikat beberapa saman pemula lain ('OS') yang bersifat serupa yang melibatkan pendahuluan yang didakwa dibuat kepada anak-anak syarikat KIDSB ('perjanjian tersebut'). Permohonan OS yang berada dalam skop perjanjian tersebut adalah: (a) OS 485, OS 487, OS 489, OS 491, OS 493, OS 495 dan OS 497; dan (b) OS 482, OS 484, OS 486, OS 490, OS 492, OS 496 dan OS 498. Defendan tidak memfailkan sebarang tindakan undang-undang terhadap plaintif berkenaan dengan hutang itu. Oleh itu, defendan tidak mempunyai penghakiman untuk hutang itu.

Walau bagaimanapun, defendan mengeluarkan notis statutori. Defendan mengatakan bahawa hutang itu adalah sebahagian daripada pendahuluan yang dibuat kepada anak-anak syarikat KIDSB yang semuanya mengalami masalah kewangan. Isu-isu untuk pertimbangan adalah: (i) sama ada hutang tersebut dipertikaikan atas alasan-alasan substansial; (ii) sama ada hutang telah diakui oleh plaintif; (iii) sama ada pemberian injunksi untuk menghalang pengemukaan petisyen penggulungan adalah satu penyalahgunaan proses; dan (iv) sama ada terdapat merit dalam OS 483.

Diputuskan:

(1) Hutang yang dikatakan perlu dibayar dan terhutang oleh plaintif kepada defendan tidak dapat dipertikaikan dengan alasan-alasan yang substansial atau sah. Hutang perlu dibayar oleh plaintif kepada defendan sebenarnya telah diakui. Plaintif sewajarnya diestop daripada ingin menafikan kewujudan hutang, atau berupa untuk mempertikaikan hutang itu. Dakwaan plaintif tidak selaras dengan hakikat bahawa pentadbiran dan kakitangan audit plaintif sendiri, Anuar, telah mengesahkan bahawa RM244,586 perlu dibayar dan terhutang. Selanjutnya, juruaudit plaintif sendiri telah memeriksa buku, akaun dan dokumen sokongan dan berpuas hati bahawa hutang itu wujud dan bahawa ia memang perlu dibayar dan terhutang oleh plaintif kepada defendan. Oleh itu, pendirian plaintif bahawa tidak ada kelulusan oleh plaintif untuk pendahuluan sedemikian atau bahawa plaintif tidak mempunyai pengetahuan mengenai butiran pendahuluan berlalu dalam dokumen-dokumen sedia ada. Ia tidak lebih daripada 'satu yang difikirkan kemudian' pada bahagian plaintif (lihat perenggan 22–26).

(2) Adalah jelas bahawa Tetuan Lim Soh & Goonting mencabar locus standi Anuar di KIDSB. Sudah terlambat bagi plaintif untuk mempertikaikan kuasa Anuar untuk menandatangani nota pengesahan audit. Oleh itu, kegagalan plaintif untuk mempertikaikan pengesahan juruaudit mereka sendiri terhadap hutang membawa kepada anggapan tertentu dan akibat undang-undang memihak kepada defendan (lihat perenggan 29–30).

(3) Dengan itu, hutang telah diakui oleh plaintif dan oleh itu tidak dipertikaikan. Maka, pemberian apa-apa injunksi untuk menghalang pengemukaan petisyen penggulungan akan menjadi penyalahgunaan proses. Tidak ada merit dalam OS 483 dan ia ditolak dengan kos. Plaintif dikehendaki untuk membayar kos RM5,000 tertakluk kepada 4% alokatur kepada defendan. Keputusan dalam OS 483 akan mengikat OS 485, OS 487, OS 489, OS 491, OS 493, OS 495 dan OS 497. Akibatnya, OS 482, OS 484, OS 486, OS 490, OS 492, OS 496 dan OS 498 telah ditolak tanpa perintah mengenai kos (lihat perenggan 33 & 35).]

Notes

For cases on injunction to restrain petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1570–1592.

Cases referred to

Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd [2000] 4 SLR 548, CA (refd)

Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation (1976) 2 ACLR 349; 1978 VR 83, SC (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213; [1995] 2 CLJ 900, CA (folld)

Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (refd)

Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)

Safeguards Corp Sdn Bhd (formerly known as Safeguards Corp Bhd) v Rampai Town Centre Sdn Bhd [2009] 1 MLJ 129, HC (refd)

Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd [2014] 5 MLJ 535, CA (refd)

Legislation referred to

Companies Act 2016 s 466

Tan Jee Sern (Ambbi Balakrishnan with him) (Shukor Baljit & Partners) for the plaintiff.

Lau Kee Sern (Zawin Najah bt Badrul Hisham with him) (Kee Sern, Siu & Huey) for the defendant.

Nantha Balan J:

INTRODUCTION

[1] This is an application by way of Originating Summons No WA-24NCC-483–09 of 2018 ('OS 483') for an injunction to restrain the presentation of a winding up petition, consequent upon the issuance of a statutory notice by the defendant (*through their solicitors*) dated 27 August 2018 under s 466 of the Companies Act 2016 (p 167, encl 4) ('the statutory notice') demanding payment from the plaintiff inn the sum of RM246,547 ('the debt'). The defendant has not filed any legal action against the plaintiff in respect of the debt. As such, the defendant does not have judgment for the debt. The statutory notice reads:

> Re: 1)
>
> 2) Your indebtedness to Laman Kejora Sdn Bhd

Statutory Notice issued under section 466 of the Companies Act 2016

We act for Laman Kejora Sdn Bhd

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2. We are instructed by our client that it has advanced you a total sum of RM246,547.00 and that you have failed and/or neglected to repay the same or any part thereofto our client as of to date.

3. In the circumstances, upon our client's instructions and on its behalf, you are hereby required to pay to our client the aforesaid sum of RM246,54 7.00 or you must secure or compound for it to the reasonable satisfaction of our client within TWENTY-ONE (21) days from the date of receipt of this notice, failing which you shall be deemed to be unable to pay your debts and proceedings will be taken for the Winding-up of your company.

[2] The plaintiff in OS 483 is Ibai Golf & Country Club Berhad (Company No 227542-A) ('the plaintiff'). The plaintiff is a wholly-owned subsidiary of Kuala Ibai Development Sdn Bhd (Company No 282366-H) ('KIDSB'). The plaintiffs auditor is Messrs Mohamed Asri & Co ('MAC') (p 44, encl 4). It is relevant to mention here that parties had agreed that OS 483 will be a 'test case' and the outcome of OS 483 case will bind several other originating summons ('OS') applications of a similar nature which involve advances that were allegedly made to the subsidiaries of KIDSB ('the said agreement').

[3] The OS applications which are within the ambit of the said agreement are:

(a) OS filed in *NCC1*:

(i) OS-24–485–09 of 2018 ('OS 485');

(ii) OS-24–487–09 of 2018 ('OS 487');

(iii) OS-24–489–09 of 2018 ('OS 489');

(iv) OS-24–491–09 of 2018 ('OS 491');

(v) OS-24–493–09 of 2018 ('OS 493');

(vi) OS-24–495–09 of 2018 ('OS 495'); and

(vii) OS-24–497–09 of 2018 ('OS 497');

(b) OS filed in *NCC2*:

(i) OS-24–482–09 of 2018 ('OS 482');

(ii) OS-24–484–09 of 2018 ('OS 484');

(iii) OS-24–486–09 of 2018 ('OS 486');

(iv) OS-24–490–09 of 2018 ('OS 490');

(v) OS-24–492–09 of 2018 ('OS 492');

(vi) OS-24–496–09 of 2018 ('OS 496'); and

(vii) OS-24–498–09 of 2018 ('OS 498').

[4] In OS 483, the plaintiff seeks to obtain a restraining order against Laman Kejora Sdn Bhd (Company No 830614-W) ('the defendant') to prevent the presentation of a winding up petition against the plaintiff. The prayers sought in OS 483 are:

1. An injunction restraining the defendant, its servants, agents or otherwise howsoever from filing, presenting, advertising and/or doing any act in relation to a petition to this Honourable Court or any other Court for the winding up of the plaintiff pursuant to a statutory notice of demand dated 27 August 2018 or any other demand for the payment of a sum of RM246,547.00 issued by the defendant under section 466 of the Companies Act 2016;

2. An injunction restraining the defendant, its servant, agents or otherwise howsoever from taking or initiating further proceedings or actions on any petition for the winding up of the plaintiff which may have been presented to this Honourable Court or any other Court;

FORTUNA INJUNCTION

[5] The plaintiff here is essentially seeking to obtain a Fortuna injunction which is a type of injunction which takes its name from the Australian case of *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation* (1976) 2 ACLR 349; 1978 VR 83 (Supreme Court of Victoria) ('the *Fortuna* case'). In *Safeguards Corp Sdn Bhd (formerly known as Safeguards Corp Bhd) v Rampai Town Centre Sdn Bhd* [2009] 1 MLJ 129 (HC), Kang Hwee Gee J (as he then was) said that the *Fortuna* case is not so easily understood in so far as it can be applied to provide a definite test of whether an injunction may issue to restrain the presentation of a winding up petition.

[6] In paras [6]–[7] of his judgment, the learned judge elucidated that an injunction may be issued to restrain the presentation of a winding up petition on a resolution of the primary consideration of whether the intended presentation of a winding up petition would constitute an 'abuse of process' which can arise in two situations: (a) if it is clear that the petition, if presented, would have no chance of success; and (b) if it is clear that the petitioner would be *presenting a petition on a debt which is disputed on substantial grounds.*

[7] The principles were clarified in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 (CA). In that case, the Court of Appeal recognised that the *Fortuna* case gave rise to two

principles. The discussion and amplification of the relevant principles for the grant of a Fortuna injunction are found in paras 25–29 of the judgment which reads (per Ramly JCA):

> [25] An application for an injunction to restrain an intended winding up petition against a company is known as a 'Fortuna Injunction', taking its name from the case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83.
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> In that case the court laid down the basis on which a court acts to restrain the presentation of a winding up petition and the two principles that guide courts in the grant of an injunction to that effect (see also: *Mobikom Sdn Bhd v Inmiss Communications Sdn* [2007] 3 CLJ 29J (CA)).
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> [26] The *first principle* laid down in that case in that an *injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success.* In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs ofthe principle ie:
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> (i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and
>
> (ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company. (see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940; and *Bryansion Finance Ltd v De Vries (No 2)* [1976] 2 WLR 41; [1976] 1 All ER 25).
>
> [27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (the appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.
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> [28] The *second principle* established in the *Fortuna* case is that an *injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.*
>
> [29] *This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented.* A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

THE PRESENT CASE

[8] In the present case, the defendant issued the statutory notice although they do not have a judgment for the debt. It is trite that if there is a judgment

for the debt then a statutory notice may be issued based on the judgment and the debt would not be capable of being disputed. However, if there is no judgment, then a statutory notice may nevertheless be issued, provided the debt is not disputed on substantial grounds. Hence, the sole issue for this court is whether the debt is disputed on substantial grounds or whether, as the defendant asserts, it has been admitted by the plaintiff.

[9] It is obvious enough that if a debt is admitted debt then there is no scope for it to be disputed. But, on the other hand, if the debt is disputed on substantial grounds, then an injunction may issue to restrain the presentation of a winding up petition. In the present case, the defendant claims that they had 'advanced' a sum of RM246,547 to the plaintiff and that the debt is due and owing to the defendant. However, the plaintiff alleges that the debt is truly disputed and that the statutory notice and the winding up petition (if filed), would be an abuse of process.

[10] Thus, the question is whether the plaintiff has demonstrated that the debt has been disputed on substantial grounds. The defendant says that the debt was part of various advances that were made to subsidiaries of KIDSB which were all having financial problems. The starting point in terms of the demand for payment is a letter dated 5 June 2018 which was issued by Messrs Kee Sern, Siu & Huey ('KSSH') on behalf of one Dato' Chang Jong Yu (pp 91–94, encl 4). The relevant parts of the letter reads as:

> Re:
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> (i) Kuala Ibai Development Sdn Bhd ('KIDSB')
>
> (ii) lbaimas Sdn Bhd ('ISB')
>
> (iii) Ibai Leisure Sdn Bhd ('ILSB')
>
> (iv) Ibai Ria Sdn Bhd ('IRSB')
>
> (v) lbai Golf and Country Club Bhd ('IGCCB')
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>
> We act for Dato' Chang Jong Yu.
>
> 2. We are instructed by our client as follows:
>
> a) your goodself and our client are directors and shareholders of KIDSB;
>
> b) ISB, ILSB, IRSB and IGCCB are wholly owned subsidiaries of KIDSB;
>
> c) pursuant to a Shareholders Agreement executed between your goodself and our client on 4.2.2009 ('the Shareholders Agreement'), it was agreed, inter alia, that:
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> ...
>
> 3. Our client further instructs that:

a) the revenue generated by KIDSB and the Subsidiary Companies in recent years was unsatisfactory and insufficient to meet their liabilities and operation costs;

b) it is within your knowledge that since 2005 our client had to make substantial advances (either personally and/or through his nominees) to KIDSB and the Subsidiary Companies in a total sum RM12,452,450.20 as working capital to defray and/or discharge, inter alia, the operating costs, the loan repayment, the income tax liability incurred and/or payable by KIDSB and the Subsidiary Companies and the penalty imposed by the Companies Commission of Malaysia upon KIDSB and the Subsidiary Companies (collectively 'the Group's Liabilities'). The particulars of the said advances are set out in the Statements of Account annexed hereto and as summarized as follows:

[11] Then, Messrs Lim Soh & Goonting ('LSG') on behalf of Dato' Seri Yong Tu Sang (*and by extension, KIDSB and its subsidiaries*), sent a letter dated 20 June 2018 (pp 122–123, encl 4) stating:

1. We act for Dato' Seri Maha' Kurnia and Dato' Seri Yong Tu Sang.

2. Your letter dated 5 June 2018 (received by our client on 13 June 20 18) was forwarded to us with instructions to reply thereto.

3. *Kindly let us have all the relevant documents, including but not limited to the purported Shareholders Agreement dated 4 February 2009, supporting your client's alleged claim within* seven (7) days *from the date hereof. Our clients shall reserve their rights to make a reply upon receipt of the supporting documents.*

4. Kindly also confirm whether or not the following directors and/or shareholders named in the companies mentioned at para 3(b) of your letter are related and/or nominees to your client:

   (5) Laman Kejora Sdn Bhd — Chang Yong Woon

   (6) Sincere Image Sdn Bhd — Dato Za'Ahar bin Mohd Adib and Mohd Faizal Bin Ramli

   (7) Sincere Image Sdn Bhd — Juliana Binti Yahya and Chang Bing Yan

   (8) Cerah Teguh Sdn Bhd — Chang Bing Yan and To' Puan Lee Chai May

   (9) Permai lkhlas Sdn Bhd — Chang Bing Yan and To' Puan Lee Chai May

1. Meanwhile, our clients deny all allegations contained in your said letter. (Emphasis added.)

[12] In response, KSSH sent a letter dated 25 June 2018 to LSG (p 125, encl 4) stating:

A We refer to the above matter and to your letter of 20.6.2018.

2. We are instructed by our client that *your client as a director is fully aware of and has full access to all the documents mentioned in our letter and/or the details of advances made to KIDSB and the Subsidiary Companies. Your client's demand for all the supporting documents and bare denial of the matters stated in our letter are unacceptable to our client.*

B

3. As requested before, our client requires the sum of *RM12,452,450.20* to be fully repaid or satisfied by KIDSB and the Subsidiary Companies and your goodself as a director and/or shareholder of KIDSB to resolve this impasse with our client without any further delay.

C

We look forward to receiving your client's reply *within SEVEN (7) DAYS* from the date hereof. (Emphasis added.)

D **[13]** This resulted in LSG sending a letter dated 12 July 2018 (pp 127–129, encl 4) wherein they stated, inter alia,

2. Our client takes note of *your client's deliberate attempt in not furnishing relevant supporting documents and information to support your client's alleged claim. Our client is entitled to infer that, either your client does not have the relevant supporting documents and information, or if furnished, would be adverse to your client. It follows that, your client's alleged claim is wholly frivolous and without merits.*

E

...

4. We are instructed that your client's alleged claim is self-serving, self-induced and perhaps to build up an otherwise helpless litigation with our client and KID Group.

F

5. Our client wishes to put on record that our client and KID Group will defend the alleged claims strenuously in the best interest of KID group. (Emphasis added.)

G **[14]** In so far as OS 483 is concerned, the plaintiffs purported basis for disputing the debt can be gathered from the following narrative:

1. The plaintiff is a subsidiary of Kuala Ibai Development Sdn Bhd ('KIDSB'). Dato' Seri Yong Tu Sang ('Dato' Seri Yong'), Yong Eva and Dato' Chang Jong Yu ('Dato Chang') are shareholders of KIDSB.

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2. Dato' Chang is also a director of the plaintiff and a majority shareholder of the defendant.

3. Through a letter dated 5th June 2018, the defendant through Dato' Chang made several allegations against the plaintiff and its majority shareholders, inter alia, that the defendant, Dato' Chang and/or Dato' Chang's nominees had made several alleged advances to the plaintiff and KIDSB Group of Companies;

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4. The alleged advances including the present were at all material times disputed by the plaintiff.

5. Despite demand from the plaintiff, the defendant and/or Dato' Chang deliberately failed and/or refused to furnish relevant documents to the plaintiffto support his alleged advance.

6. The alleged advances including the present were not supported nor provided by any judgment in any competent court of law;

7. The alleged advances were not approved by the plaintiffs board of directors;

8. The defendant had issued a notice of demand pursuant to Section 466 of the Companies Act 2016 dated 27th August 2018 ('s 466 Notice') against the plaintiff demanding for the payment of the alleged advance of RM246,547.00.

9. The defendant, Dato' Chang and Dato' Chang's nominees had caused to issue altogether fifteen s 466 Notices against the KIDSB Group of companies at the same time. The action and threat by the defendant, Dato' Chang and Dato' Chang's nominees to file fifteen winding up petitions at the same time are mala fide and an abuse of process of the Court.

10. By letter dated 11 September 2018, the plaintiffs solicitors had again denied the alleged advance and the defendant was requested to withdraw the s 466 Notice.

11. Until to-date, the defendant had failed and/or refused to withdraw the s 466 notice.

12. The defendant should have filed a writ and statement of claim so that the dispute on the alleged advance could be properly litigated in Court.

13. The defendant at all material times has knowledge that the plaintiff is an active and solvent company and plaintiff had sufficient unencumbered assets far exceeding the alleged advance.

14. The plaintiff has on-going businesses. If a winding up petition is presented against the plaintiff, it will cause immense and irreparable damage to the plaintiff.

[15] In answer to the position that was taken by the plaintiff, the defendant asserted in para 6 of encl 7 that:

(a) Dato' Seri Yong and/or Yong Emmy are at all material times fully aware of and/or have full access to all the documents and/or the details of the advances made by the defendant to the plaintiff;

(b) the advances made by the defendant to the plaintiff had been duly approved, accepted and/or utilised by the plaintiff and/or its board of directors;

(c) *the plaintifrs indebtedness to the defendant (which formed the basis of the defendant's demand of 27 August, 2018 in exh 'YE'10' of the plaintiffs*

affidavit) has been admitted by the plaintiff and is therefore not disputed; and

(d) in the premises, *the plaintiff is estopped from disputing or denying its indebtedness to the defendant herein.* (Emphasis added.)

[16] The plaintiffs response to para 6 of encl 7, is to be found in para 6 of encl 8, and reads as:

> 6. Perenggan 6 jawapan defendan adalah dinafikan secara keseluruhannya dan plaintif meletakkan defendan di bawah dasar bukti yang kukuh bagi segala pengataannya tersebut. Selanjutnya, saya menyatakan seperti berikut:
>
> (a) Segala pendahuluan yang kononnya dibuat oleh defendan kepada plaintif tidak pernah diluluskan oleh plaintif dan/atau lembaga pengarah plaintif;
>
> (b) Segala hutang yang kononnya dihutang oleh plaintif kepada defendan tidak dibuktikan dengan apa-apa penghakiman. selanjutnya, segala hutang tersebut adalah dipertikaikan oleh plaintif secara bona fide dan/atau alasan *substantive* ('bona fide disputed debt') pada setiap masa yang material. Seterusnya segala dokumen yang dirujuk oleh defendan di dalam jawapan defendan tersebut gagal untuk membuktikan keberhutangan plaintif kepada defendan; dan
>
> (c) Notis 466 yang dikeluarkan oleh defendan terhadap plaintif tersebut adalah dibuat dengan niat untuk memaksa plaintif membayar hutang yang dipertikaikan tersebut dan ia merupakan suatu penyalahgunaan proses Mahkamah yang mana mewajarkan campur tangan Mahkamah Yang Mulia ini. (Emphasis added.)

[17] Hence, the issue now is whether based on the documentary evidence that has been presented by way of the various affidavits and the averments therein, there is any tangible/credible evidence of an admission of the debt by the plaintiff or alternatively, evidence which shows that the debt is disputed on substantial grounds.

ADMISSION OF DEBT

[18] In so far admission of the debt is concerned, counsel for the defendant drew the court's attention to what he describes metaphorically as the 'smoking gun' documents to demonstrate that the debt is admitted and therefore cannot be disputed:

(a) the plaintiffs audited financial statement ('AFS') (p 130 exh CB45 encl 7) which shows that a sum of RM1,542,626 is due and owing by the plaintiff to 'related companies';

(b) the defendant also refers to an 'audit confirmation' dated 15 August 2016 (exh CBY8 p 232, encl 7) which was issued by the defendant to the plaintiff wherein confirmation was sought in relation to the debt for the

sum of RM244,586 (as at 31 December, 2015). The audit confirmation was signed by one Anuar bin Jusoh (administrative and accounts executive) ('Anuar') on behalf of the plaintiff. The confirmation by Anuar is dated 18 August 2016. The audit confirmation reads as:

Ibai Golf & Country Club (M) Sdn Bhd

Dear Sirs,

Our auditors, Mohamed Asri & Co, are now engaged in an examination of our financial statements. In this connection, they wish to confirm the balance from you at 31 December 2015 which was shown on our records as RM244,586.

Please state in the space below whether or not this is an agreement with your records at that date. If not, please furnish any information you may have which will assist the auditors in reconciling the differences.

After signing and dating your reply, please mail/fax it directly to the auditors. A reply paid envelope is enclosed for your convenience.

Yours faithfully,

LAMAN KEJORA SON BHD

(Financial Controller/Accountant) Mohamed Asri & Co

B 42, 2nd Floor

Jalan Gambut 25000 Kuantan

Fax No: 09-5161307

The above balance ofRM244,586 due to *LAMAN KEJORA SDN BHD, agree/does not agree** with our record at *31 December 2015.*

IBAI GOLF & COUNTRY CLUB BHD (227542-A)
969K, Kg Tok Adis, Mukim Kuala lbai
20400 Kuala Terengganu
Tel: 09-6163500/6163600
Fax: 09-6163700

-sgd-

Signature

ANUAR B JUSOH/ ADMIN ACCOUNTS ....

Name and designation

18/8116

Date

(c) the plaintiffs rubber stamp appears on the audit confirmation by Anuar. There is no indication in the audit confirmation that the plaintiff did not agree with the amount which is stated to be due and owing by the plaintiff to the defendant. During oral submissions, counsel for the plaintiff said that Anuar was not a director of the plaintiff and not authorised to sign on the audit confirmation note.

But, it was pointed out by the defendant that this was not raised in the plaintiffs affidavit(s) and was a mere statement from the Bar. There is no evidence that the plaintiff had taken any steps to impugn Anuar's confirmation of the debt (p 232, encl 7) by way of any warning letter or any disciplinary proceedings against Anuar. Counsel for the plaintiff then referred to a letter dated 24 August 2018 from LSG to KSSH (pp 160–161 encl 3) wherein reference was made to Anuar as not being an employee of KIDSB. The said letter was in fact in response to a letter dated 9 August 2018 from KSSH to LSG (pp 157–159 encl 3). I will come back to this topic in the latter part of this judgment. For now, it is important to add that in yet another audit confirmation dated 6 March 2018 which was issued by the defendant, Anuar had again signed off on the document and confirmed that the amount due as at 31 December 2016, was RM244,586. The audit confirmation by Anuar was signed on 8 March 2018 (p 236, encl 7); and

(d) the next *critical document* is a letter dated 23 August 2018 (p 132 exh CBY6 encl 7) wherein MAC wrote to the defendant (*for the attention of Dato' Chang*) and stated the following:

IBAI GOLF & COUNTRY CLUB BHD

CONFIRMATION OF AUDIT FOR THE FINANCIAL YEAR ENDED 31 DECEMBER 2014

Refer to the above mentioned and our earlier discussion, we would like to confirm the following balances:

...

4. Other Creditors — Amount Due To/From Related Companies

a)	Bukit Jong Quarry Sdn Bhd	(5,093)
b)	Ibai Leisure Sdn Bhd	99,191
c)	Ibai Ria Sdn Bhd	274,804
d)	Ibaibina Consolidated (M) Sdn Bhd	689,615
e)	Ibaimas Sdn Bhd	261,426
f)	Ladang Ternakan Wawasan Sdn Bhd	(23,865)
g)	*Laman Kejora Sdn Bhd*	*246,547*
		1,542,625

Should you have any queries, please do not hesitate to contact us.

Thank you.

Yours faithfully,

MOHAMED ASRI & CO

-sgd-

UMA SELVAM SRI D KRISHNAN

EXECUTIVE DIRECTOR

[19] The defendant contends that it is significant that the plaintiffs own auditors (MAC) had confirmed that RM246,547 was due and owing by the plaintiff to the defendant. Thus, it was contended that the amount which was due and payable by the plaintiff to the defendant as at 23 August 2018 was RM246,547.

[20] It was therefore argued for the defendant that if the plaintiff truly disputed the debt, then the most logical and reasonable response would have been for the plaintiff to impugn MAC's confirmation of the debt. But, the plaintiff remained inert and indifferent even after the MAC letter dated 23 August 2018 was brought to the plaintiffs attention via the defendant's affidavit (encl 7).

[21] Thus, the defendant contended that the affidavits that were filed by the plaintiff do not show that the plaintiff challenged their own audit's confirmation, per the MAC letter dated 23 August 2018 that RM1,542,625 was due owing to related companies, and that out of this sum, RM246,547 was due and owing by the plaintiff to the defendant. I turn now to my conclusions.

CONCLUSION

[22] I have critically examined the averments of the parties per the affidavits that were filed by the parties and the documents, particularly the specific documents referred to in the earlier part of this judgment and I am impelled to the view that the debt which is said to be due and owing by the plaintiff to the defendant has not been credibly disputed on any substantial or valid grounds. In so far as the obligation and duty on the part of the court in terms of the appreciation of affidavit evidence is concerned, I applied the principle that was enunciated by Gopal Sri Ram JCA (as he then was) in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213; [1995] 2 CLJ 900 Court of Appeal, where he said (at p 220 (MLJ); p 904 (CLJ)):

> Whenever a court is required to judicially appreciate affidavit evidence, it is a necessary adjunct of that function to ascertain whether allegations made are inherently improbable or inherently incredible or patently inconsistent with contemporaneous documents. Whether such an analysis ought to be undertaken

depends upon the jurisdiction the court is exercising and, more importantly, upon the particular facts of a case.

[23] I am of the view that based on the AFS, the audit confirmation by En Anuar dated 18 August 2018 (p 232, encl 7) and his audit confirmation dated 8 March 2018 (p 236, encl 7) and finally (*and very significantly*), the clear and unqualified and unequivocal confirmation by MAC (pp 132–134, encl 7) (*who were/are the plaintiffs own auditors*), the debt due by the plaintiff to the defendant is in fact admitted. The plaintiff is accordingly estopped from seeking to deny the existence of the debt, or in purporting to dispute the debt.

[24] In so far as the plaintiffs assertion that there was no 'approval' for the advances that were made by the defendant and/or that the defendant has failed to provide the supporting documents despite requesting for the same per the plaintiffs solicitors letter dated 20 June 2018, I find that this position does not sit well with the fact that the plaintiffs own administration and audit staff, Anuar had on 18 August 2016 confirmed that RM244,586 was due and owing as at 31 December 2015. Further, on 8 March 2018, Anuar had again confirmed that RM244,586 was due and owing as at 31 December 2016.

[25] Further, the fact that MAC had confirmed in writing via their letter dated 23 August 2018 that RM246,547 was due and owing by the plaintiff to the defendant, must mean that the plaintiffs own auditor had examined the books, accounts and supporting documents and satisfied themselves that the debt exists and that it is indeed due and owing by the plaintiff to the defendant. It cannot be anything else.

[26] Hence, the plaintiffs stance that there was no approval by the plaintiff for such an advance or that the plaintiff has no knowledge about the details of the advance flies in the face of the contemporaneous documents. It is nothing more than an 'afterthought' on the plaintiffs part.

[27] I turn now to the issue of the plaintiffs challenge to Anuar's position per their letter dated 24 August 2018. Here, I find that the issue must be seen in the context of and confined to the discussion relating to KIDSB. This is in fact made quite clear by the following paragraphs in the letter from KSSH dated 9 August 2018 and LSG's letter dated 24 August 2018. In KSSH's letter dated 9 August 2018, they said:

> 2. We are instructed by our client to state as follows:
>
> (a) our letter of 5.6.2018 was issued to your client for the sole purpose of seeking an amicable resolution with your client in respect of the financial

issues faced by KIDSB, ISB, ILSB, IRSB and IGCCB (collectively, 'KID Group of Companies') and the amounts due and owing by KID Group of Companies to our client;

(b) our client has no intention at all to initiate any legal disputes with your client. In fact, the letters dated 20.6.2018, 12.7.2018 and 3.8.2018 which our client received from your firm as solicitors for your client are most disappointing. For it is clear that your client has no intention to resolve the issues raised by our client but he:

(i) attempted to flee from all his responsibilities as a Group Executive Chairman and director of the KID Group Companies;

(ii) disregarded the enormous contributions made by our client and blamed him instead for the financial difficulties faced by KID Group of Companies; and

(iii) made various unwarranted allegations against our client without due regard to the fact that he is a Group Executive Chairman and director and he is equally responsible for the management and financial affairs of the KID Group of Companies;

(c) *Encik Anuar bin Yusof has from time to time updated your client and our client as directors on various management matters, including the financial position and requirements of the KID Group of Companies.* In fact, these matters were also raised in the meetings convened in previous years. Our letter of 5.6.2018 would not have been necessary but for your client's indifference and his repeated refusals to extend his cooperation to our client in dealing with the various financial requirements of KID Group of Companies;

(d) the books and accounts of the KID Group of Companies are at all times kept at the office premises in accordance with the requirements of the Companies Act 2016. They were never kept or maintained by our client as alleged, nor was there any 'admission' made to that effect in any of our earlier correspondence;

(e) your client's statutory right as a director to inspect the books and accounts of the KID Group of Companies does not include any right to remove any of them from the office premises or any right to retain them for whatsoever reason he may have. *Contrary to your client's contention, our client has been informed by Encik Anuar bin Yusof that your client's removal and continued retention of the relevant books and accounts of KID Group of Companies have adversely hindered him from:*

(i) responding to audit queries raised by the auditor and hence, the finalisation of the audited reports for the financial year ended 31.12.2016 to 31.12.2017;

(ii) maintaining the books and accounts of the KID Group of Companies in accordance with the Companies Act 2016; and

(iii) allowing our client as a director to have access and inspection of the

books and accounts of the KID Group of Companies that are now retained by your client;

(f) your client is fully aware at all times that the accounts of the KID Group of Companies were not audited since the year 2015 and the reasons therefore. *In fact, he was also repeatedly reminded by Encik Anuar bin Yusof of the same from time to time.* Yet, he chose to ignore it and refused to work with our client in dealing with the various financial requirements of KID Group of Companies. Having adopted such a lackadaisical attitude, it is totally unconscionable for your client to now accuse our client for 'exposing the companies to various statutory offences' or causing 'the present adverse status of the companies'; and

[28] In LSG's letter dated 24 August 2018, Anuar's position vis a vis KIDSB was raised in the following context:

1. We refer to your letter dated 9th August, 2018 in respect of the above matter.

2. Our client reiterates his stand that he does not wish to litigate your client's self induced disputes through correspondence between lawyers. It does not really serve any useful and not in the best interests of the KID group of companies. Our client had instructed the company secretary of the above companies to convene board meetings on an urgent basis so that your client could raise all outstanding matters for discussion and to be resolved in the best interests of the KID Group of Companies.

3. We are instructed to reply to the following matters:

3.1 as far as our client's knowledge, *Encik Anuar bin Yusof is not an employee of KID group. Why is your client so willing to disclose confidential internal information of the KID group to an outsider?*

[29] Thus, it is clear that LSG was challenging Anuar's locus standi vis a vis KIDSB. What is important in so far as OS 483 is concerned is Anuar's position as the administration and accounts executive of the plaintiff, which does not appear to have been challenged in any of the plaintiffs affidavits. Thus, it is way too late for the plaintiff to impugn Anuar's authority to sign on the audit confirmation notes dated 18 August 2016 (p 232, encl 7) and 8 March 2018 (p 236, encl 7).

[30] Thus, the plaintiffs failure to impugn their own auditor's (MAC's) confirmation of the debt leads to certain presumptions and legal consequences in favour of the defendant. The legal significance of an unqualified audit confirmation is that if confirmation of a debt due is sought and is given unconditionally, then it gives rise to an *admission*. In *Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd* [2014] 5 MLJ 535 the Court of Appeal said that once an audit confirmation is given, then there is no room for

any denial of the debt.

[19] The learned judge also relied on the audit certification request dated 21 June 2010 made by the appellant's group accountant. Paragraph 1 of the said audit certification reads: 'Our auditors are now engaged in an examination of our financial statements. In this connection, they wish to confirm the balance due from on your account at 31 December 2010, which was shown in our record as RM3,887,555.12'.

[20] In short, the significance of the audit certification request can be seen from the statement contained therein. It specifically states that in the appellant's financial book, the amount due to the respondent is RM3,887,555.12. *This is a clear admission of debt based on the amount stated as at the date 31 December 2010. An audit confirmation request is an important step in an audit of a company's financial accounts. It is a way of ensuring that the amount as appears in the company's book is correct and the only manner to confirm this amount is by way of confirmation by the creditor concerned.*

[21] *Based on the above documents, namely the certification of payments by the appellant's appointed consultant, Messrs JSPEC and the audit confirmation request by the appellant's group accountant, we are satisfied that the learned High Court judge was correct in coming to a conclusion that the appellant's defence to the respondent's counterclaim is unlikely to succeed in a trial as it raises no triable issue. We are in agreement with such findings and find no reason to disturb it. To us, the position is clear ie upon certification by the appellant's consultant payment must be made to the respondent. The certification was confirmed by the appellant's itself when it issued an audit confirmation request. The authenticity of the audit confirmation request issued by the appellant is not in dispute in view of those documents above, the appellant cannot possibly deny the same*.

[31] In *Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd* [2000] 4 SLR 548, the Singapore Court of Appeal opined that an audit confirmation constituted strong prima facie evidence of a debt. At para 37, Chao Hick Tin JA said:

The 1998 audit confirmation executed by Phay further substantiated that. The evidence, in the totality, convincingly supported the appellant's claim.

[32] The consequences where a debt is admitted was discussed in *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817, where the Court of Appeal held at paras [11], [20] and [21] that if the debt was admitted, then there could not be any bona fide or genuine dispute as to the debt. In that case, the court held that the respondent who could not meet the current demand of the appellant, was insolvent and the winding up of the respondent should be a 'forgone conclusion'. Paragraphs [11], [20] and [21] of the judgment read as:

[11] But with respect, we do not see how the respondent, by that affidavit, could have raised a doubt or question on the liability of the respondent to the appellant.

If at all, the respondent only confirmed that the debt was true and due. To take it from the start, at 128AR and 130AR (paras 6 and 14), the respondent admitted that the total debt was RM53,701.65 (RM50,000 plus RM3,701.65). At 128–129AR (paras 7–9), the respondent admitted that only three instalments (a total of RM20,138.13) had been paid. In other words, the respondent admitted that five instalments had not been paid. And at 129AR (para 11), the respondent admitted that the third instalment was only paid after issuance of the s 218 notice. When it was issued, the petition stated that the outstanding debt was RM36,574.58 for goods sold and delivered, and RM7,302.08 for accrued interest, as it stood at 3 April 2007. But by affidavit dated 17 October 2008, the petition was corrected to reflect the payment of the third instalment which had reduced the outstanding debt from RM36,574.58–RM29,861.87 for goods sold and delivered (see 126AR).

After the correction, the petition only claimed RM29,861.87 for goods and sold and delivered. And that debt for goods sold and delivered could not be disputed. The respondent admitted that the principal sum was RM50,000. Payment of three instalments (or RM20,138.13) left a balance of RM29,861.87, which was the exact sum claimed for goods and sold and delivered. The other claim was for RM7,302.08, for interest accrued up till 3 April 2008. The total claim of the appellant was therefore made up of RM29,861.87, which could not be disputed, and RM7,302.08, which as the agreed interest could also not be disputed. The total claim was for RM37,163.95. There was simply no basis to say that the appellant claimed RM43,876.66.

Based on admitted sums and figures, the ultimate sum of RM37,163.95 was true and correct. There was no bona fide dispute as to that debt. It could not be to the contrary. The three instalments were fully credited. The claimed interest was for that period up till 3 April 2008. Since interest was not claimed for the period after 3 April 2008, it was absurd to argue that the payment of the third instalment on 20 August 2008 affected the computation of the interest.

...

[20] The winding up order should have been made even if the respondent was solvent (*Cornhill Insurance plc v Improvement Services Ltd and ors* [1986] 1 WLR 114, where it was held by Harman J that where a creditor's debt is clearly established, then the creditor has the right to present a winding up petition and obtain relief even though the company was solvent). 'Where the creditor's debt is clearly established it seems to me to follow that this court would not, in general, at any rate, interfere though the company would appear to be solvent ... to persist in non-payment

... would itself either suggest inability or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt' (*Mann v Goldstein* [1968] 1 WLR 1091 per Ungoed-Thomas J). The solvency of a company counts for nothing if it is not ready, willing and able to meet the demand ofthe creditor. The discretion to refuse winding up could be exercised if the respondent was ready, willing and able to meet the demand of the appellant (see *Imperial Hydropathic Hotel Company, Blackpool, The v Hampson, Re* (1882) 23 Ch D 1; [1883] 49 LT 147, 151, where the company was solvent and the creditor accepted the proposal to pay the debt within one

month, the Court of Appeal (Jessel MR, Cotton and Bowen UJ) ordered the debt to be paid within one month, in default of which 'there will be the usual winding up order'). But it was not that in the instant case.

[21] There was no genuine dispute. The respondent was insolvent. The respondent was not ready, willing and able to meet the demand. Winding up should have been the foregone conclusion.

OUTCOME

[33] As such, in view of the several matters alluded to above and the legal principles that are applicable, I am of the view that the debt has been admitted by the plaintiff and is therefore not in dispute. Hence, the grant of any injunction to restrain the presentation of a winding up petition, would in the present circumstances, be an abuse of process. In the result, I am impelled to the view that there is no merit in OS 483 and it is hereby dismissed with costs. The plaintiff is to pay costs of RM5,000 (*subject to 4% allocatur*) to the defendant. As agreed between the parties on 25 September 2018, the outcome in OS 483 will bind the following proceedings in *NCC1*:

(a) OS-24–485–09 of 2018 ('OS 485');

(b) OS-24–487–09 of 2018 ('OS 487');

(c) OS-24–489–09 of 2018 ('OS 489');

(d) OS-24–491–09 of 2018 ('OS 491');

(e) OS-24–493–09 of 2018 ('OS 493');

(f) OS-24–495–09 of 2018 ('OS 495'); and

(g) OS-24–497–09 of 2018 ('OS 497').

[34] As agreed between the parties, the outcome in OS 483 will also bind the following proceedings in *NCC2* namely:

(a) OS-24–482–09 of 2018 ('OS 482');

(b) OS-24–484–09 of 2018 ('OS 484');

(c) OS-24–486–09 of 2018 ('OS 486');

(d) OS-24–490–09 of 2018 ('OS 490');

(e) OS-24–492–09 of 2018 ('OS 492');

(f) OS-24–496–09 of 2018 ('OS 496'); and

(g) OS-24–498–09 of 2018 ('OS 498').

[35] Consequently, OS 482, OS 484, OS 486, OS 490, OS 492, OS 496

A and OS 498 are dismissed with no order as to costs. The parties shall report the outcome of the above matters to the learned judge of NCC2 for the appropriate order(s) to be made.

Order(s) accordingly.

B

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh

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